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72-1619

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IN THE SUPREME COURT OF THE UNITED SATES
OCTOBER TERM, 1972

EDMOND GABRIEL HARDY, JR.,

Petitioner

v

STATE OF NORTH CAROLINA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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TABLE OF CITATIONS

JACKSON v DENNO, 378 U.S. 368

MATHIS v UNITED STATES, 391 U.S. 1, 20 L. Ed. 2d 381, 88 S. Ct. 1503

McCRAY v. ILLINOIS, 386 U.S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056

MIRANDA v. ARIZONA, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602

ON LEE v. UNITED STATES, 343 U.S. 747, 96 L. Ed. 1270, 72 S. Ct. 967

ROVIARO v. UNITED STATES, 353 U.S. 53 1 L. Ed. 2d 639, 77 S. Ct.

STATE v. HARDY, 17 N.C., App. at 174

STATUTES INVOLVED

7A-271, N. C. G. S.

7A-27(b), N. C. G. S.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

EDMOND GABRIEL HARDY, JR.,

Petitioner

v

STATE OF NORTH CAROLINA

Respondent

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioner prays that a Writ of Certiorari issue the Supreme Court of North Carolina, which Cour last heard this case on petition for Certiorari to the Court of Appeals of North Carolina and denied the petition without opinion, and to the Court of Appeals of North Carolina, which Court wrote the opinion in this case, in STATE OF NORTH CAROLINA vs. ELMOND (EDMOND) GABRIEL HARDY, JR., 17 N. C. app. 169. (case is still reported in advance sheets.)

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of North Carolina is reported as STATE of NORTH CAROLINA vs. ELMOND (EDMOND) GABRIEL HARDY, JR., 17 N. C. app. 169.

JURISDICTION

The jurisdiction of this Court is involved under 28 U. S. Code 1257 (3). Petition is made to this Court to review the opinion of the Court of Appeals of North Carolina in STATE OF NORTH CAROLINA vs. ELMOND (EDMOND) GABRIEL HARDY, JR., 17 N. C. app. 169, and the denial of a petition for Certiorari by the Supreme Court of North Carolina to the Court of Appeals of North Carolina. The petitioneder petitioned the Supreme Court of North Carolina to issue the Writ of Certiorari to the Court of Appeals of North Carolina to review the opinion oof the Court of Appeals of North Carolina, but the petition for the writ was denied on March 6, 1973. The petition to the Supreme Court of North Carolina was made in apt time under the Supplementary Rules of Practice of the Supreme Court of North Carolina, Rule 2 (271 N. C. 745), and the petition was denied on March 6, 1973 and certified to the Court of Appeals of North Carolina on March 6, 1973.

The petition for certiorari to the Court of Appeals of North Carolina was made to the Supreme Court of North Carolina to exhaust all State remedies before applying to this Court. The matters raised here were raised in the Courts below. Jurisdiction of Court is thus invoked within the time allowed by Rule 22 of the Revised Rules of the Supreme Court of the United States.

A copy of the opinion of the Court of Appeals of North Carolina and a copy of the Order denying

Certiorari by the Supreme Court of North Carolina are attached as is required by Rule 23 of this Court.

QUESTIONS PRESENTED

(1) IS IT CONSTITUTIONAL ERROR TO ARREST A CITIZEN FOR HAVING A WEAPON CONCEALED IN HIS AUTOMOBILE AND NOT WARN HIM OF HIS RIGHTS TO COUNSEL AND TO REMAIN SILENT BUT THEN QUESTION HIM ABOUT ANOTHER ALTOGETHER DIFFERENT CRIME WITHOUT ANY FURTHER CONSTITUTIONAL WARNING AND ENTER IS STATEMENTS AGAINST HIM IN THE TRIAL?

(2) IS IT CONSTITUTIONAL ERROR TO OVERRULE AN OBJECTION TO AN ALLEGED STATEMENT MADE BY A DEFENDANT IN CUSTODY AND ALLOW IT INTO EVIDENCE BEFORE HOLDING A VOIR DIRE AS REQUIRED BY JACKSON vs. DENNO, 378 U.S. 368?

(3) IS IT CONSTITUTIONAL ERROR TO REFUSE TO ALLOW DEFENSE COUNSEL TO QUESTION THE OFFICER WHO SECURED THE SEARCH WARRANT ABOUT THE ALLEGED INFORMER EXCEPT WHETHER HE HAD BEEN RELIABLE IN THE PAST OR NOT AND TO CUT ALL OTHER CROSS-EXAMINATION?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution

of the United States is invoked. The Sixth Amendment to the Constitution of the United States is also invoked.

STATEMENT OF CASE

This case was tried in the Superior Court of North Carolina, which is the court designated by statute for the trial of felonies, North Carolina General Statute 7A-271. The case was tried upon a plea of not guilty to a charge made in an indictment of possession of a controlled substance (drugs) with intent to distribute . At the trial the state elected to proceed on the charge of simple possession of heroin, which is an included offense. The case was tried to a jury.

The jury returned a verdict of guilty, and the court imposed a sentence of five years imprisonment in the State Department of Corrections.

During the trial of the case the defendant properly interposed his constitutional objections. His objection to the restriction on cross-examination was made but it was not couched in constitutional terms. In view of this court's ruling that cross-examination is constitutionally protected, it is brought here. The case was appealed to the Court of Appeals, which is the North Carolina Court designated to handle all criminal appeals except those of a capital nature, North Carolina General Statute 7A-27(b). That court found no error in the case. Subsequent thereto, and in apt time, petition was made to the Supreme Court of North Carolina in order to exhaust all state remedies. That court de-

nied the petition on March 6, 1973. The case is brought here within the time allotted by the rules of this Court.

REASONS FOR GRANTING THE WRIT

I

IS IT CONSTITUTIONAL ERROR TO ARREST A CITIZEN FOR HAVING A WEOPON CONCEALED IN HIS AUTOMOBILE AND NOT WARN HIM OF HIS RIGHTS TO COUNSEL AND TO REMAIN SILENT BUT THEN QUESTION HIM ABOUT ANOTER ALTOGETHER DIFFERENT CRIME WITHOUT ANY FURTHER CONSTITUTIONAL WARNING AND ENTER HIS STATEMENTS AGAINST HIM IN THE TRIAL?

The Writ of Certiorari should be granted in this case to decide in a proper manner whether this defendant — and all others like him all over the country — can be arrested for a minor crime — here, having a concealed weapon — and after arresting him, question him about other, much more serious crimes without warning him of his constitutional rights tocounsel as provided for in **MIRANDA** vs. **ARIZONA,** 384 U.S. 436. The case before the Court is, however, much more insidious than the harm sought to be protected in the Miranda case. Here the harm was compounded by an arrest for an altogether unrelated crime, which would ordinarily allow for immediate bond and release — or indeed for release without a bond. Then, after the arrest, the officers felt free to question the defendant — petitioner about the other unrelated charge of which they had failed to find any evidence even after ex-

tensive searching. They, in fact, did question him about the drug charge and without any warnings about his constitutional rights. It is true that the questioning was not made under a big light or done in a violent manner. But it was done in a much more insidious way. It was done after the defendant was put under arrest. Thus he knew that he could be kept by the police for as long as the police wished to keep him. There was no getting away from the questioning then.

Some people have, of course, called for the abolition of the exclusionary rule, but so long as it is still a part of our jurisprudence it ought to be extended to all evenly. The practice of the police here follows all too clearly the pattern that appears to be developed in this area — and perhaps, unfortunately, in other areas also. That is, the police, when they suspect persons of drug activity will have a separate charge to bring against the person. This charge may be altogether fraudulent, but it serves to hold the defendant until a confession can be obtained from the softened-up defendant or until other searches can be made under the guise of th arrest. This is, of course, a matter that cannot be definitely proved, but one only has to look at the number of other, unrelated charges that are lodged against persons charged with possession of drugs to see the drift. These other charges are often dismissed without prosecution later. An especially useful charge that the police find useful is to charge a girl with fornication and adultery if she is living in the same house with a male. This serves

to hold the girl and to soften her for a confsession.

There is precedent that holds that even though a person is held for one crime, that of itself does not obviate the need to give the **MIRANDA** warnings. **MATHIS** vs. **UNITED STATES,** 391 U.S. 1, 20 L. Ed. 2d 381, 88 SCt 1503. In **MATHIS** the defendant was serving a sentence in a state institution of incarceration. While serving the sentence he was questioned by an internal revenue agent who did not give the **MIRANDA** warnings to the defendant. The defendant made certain incriminating statements to the agent. This Court ruled the evidence inadmissible. The instant case brought by the petitioner is little different from **MATHIS.** If anything, it can be fairly argued that it is even less fair than **MATHIS** because, here, in the instant case, the defendant — petitioner had been searched and his car had been searched. Finding nothing, the arresting officers carried the defendant — petitioner's car to a garage for further search. (The defendant — petitioner suggested to the jury that this hiatus period gave an unscrupulous police officer ample time to plant a portion of heroin on the car. But that is a question of fact). Then after the passage of some considerable time the police announced that they had found something which they suspected of being heroin. By this time the defendant — petitioner made a statement that incriminated him. Admittedly the questioning was not of a coercine nature, but it was, nevertheless questioning, which is one of the things the **MIRANDA** decision was written to guard against. **MIRANDA** vs. **ARIZONA,** supra.

What is the difference between the instant case and **MATHIS?** Apparently none of substance. But the North Carolina court got around the problem by holding that the statement was voluntary. No doubt statements made voluntarily by a person before the person is put under arrest or is questioned about the crime by the police are admissible in evidence and do not run afoul the **MIRANDA** rule. The North Carolina court cited a plethora of North Carolina cases for its position on this point, but all of them miss the point and do not comport with the **MATHIS** case. This is true because, again, the defendant — petitioner was under arrest and was thereby coerced by the mere fact of being put under arrest and, indeed, had lost his freedom.

Additionally, the court seemed to think that the fact that the defendant was in custody did not matter, STATE vs. HARDY, 17 N. C. app. at 174, but neither does this comport with the **MATHIS** case.

But even above this is the assumption by the North Carolina court that there was no custodial questioning. The record shows that the defendant was put under arrest on the concealed weapon charge almost as soon as he was detained. He was at that time in custody for purpose of the **MIRANDA** rule. He was questioned then about something for which he had not been arrested. That is the crux of the problem, and is the part that the North Carolina courts failed to meet.

II

IS IT CONSTITUTIONAL ERROR TO OVER-

RULE AN OBJECTION TO AN ALLEGED STATEMENT MADE BY A DEFENDANT IN CUSTODY AND ALLOW IT INTO EVIDENCE BEFORE HOLDING A VOIR DIRE AS REQUIRED BY JACKSON vs DENNO, 378 U.S. 368?

There is another facet of this part of the case that violates the MIRANDA rule. The defendant — petitioner objected to any statement allegedly made by the defendant before the police officer ever related on the stand what he claimed the defendant said. STATE vs. HARDY, 17 N. C. app. at 173 and Printed Record p. 56. At that time the Court should have sustained the objection and held a **voir dire** on the question of whether the officers had given the defendant the MIRANDA warnings or he should have determined whether the statement was voluntary, **JACKSON** vs. **DENNO,** 378 U.S. 368, but that was not done here until after the alleged incriminating remarks were allowed into evidence. This was quite clear from the record, and indeed, the North Carolina Court of Appeals quoted the very language in its opinion, 17 N. C. app. at page 173, quoting officer J. D. Heffinger of the Greensboro Police Department:

> "Before the bags were found, Officer Bunto, who was standing with Mr. Hardy asked Mr. Hardy if he wanted to go and sit in the police car out of the rain and cold. Mr. Hardy stated that —

'DEFENSE COUNSEL: "Objection." 'COURT. "Overruled. Exception Number E 58' 'Witness (continuing):" that he did not, that he wanted to stay there and see what stuff that the officers found. About five or ten minutes passed before the glassine bags were found. As I was counting the bags, Detective Gibson again laid down in the seat and started to reach up under the dash and he said 'let me see if I can find anything else.' Mr. Hardy said, 'no, that's all there.'" 'Mr. Taylor: "Objection to that and move to strike." '

The motion was not allowed, but then the trial court got into a **voir dire** as is required by **Jackson** vs. **Denno,** supra. That was too late of course. The damage had been done. The jury had heard the alleged statements. All the **voir dires** and findings after that could not undo the damage, and the defendant — petitioner was severely prejudiced. Furthermore, the court made no attempts to rectify the damage, either during the trial or in his charge. It would have been pointless at that late date anyway, and it is, of course, much easier to find voluntariness of a defendant's statement after a statement has been allowed into evidence than it would have ben if the trial court had properly stopped the trial as is required by the constitutional decisions of this court and held a voir dire to determine whether the police had properly warned the defendant of his constitutional rights as compelled by the **MIRANDA** decision.

In short, what the trial court did here was to allow the damaging statement into evidence, and then held a **voir dire** to determine whether the defendant had been properly warned of his rights Then, even if the court made findings that the arresting officers had not properly warned the defendant of his rights, the damage would have already been done. One can categorically asseverate that this court does not mean for a trial court to use this type tactic with a defendant's rights. To allow it is to emasculate the **MIRANDA** rule, for a trial court will then be allowed to have it both ways" allow the statement into evidence, and then hold a voir dire to determine whether the **MIRANDA** warnings were properly given. If they were, he can rule the statemnt is proper for the jury to hear. If they have not been properly given, then, well, the jury has heard it anyway, and no amount of telling a jury to disregard a statement can wipe it out of the juror's minds.

III

IS IT CONSTITUTIONAL ERROR TO REFUSE TO ALLOW DEFENSE COUNSEL TO QUESTION THE OFFICER WHO SECURED THE SEARCH WARRANT ABOUT THE ALLEGED INFORMER EXCEPT WHETHER HE HAD BEEN RELIABLE IN THE PAST OR NOT AND TO CUT OFF ALL OTHER CROSS-EXAMINATION?

Probably the worst of the constitutional errors committed in this case was the extreme restrictions put upon defense counsel in his efforts to cross-examine one of the arresting officers with regard to

what he knew about the informer who allegedly gave the police their information needed concerning the defendant — petitioner to have the magistrate issue a search warrant. Repeatedly the defense counsel asked questions concerning the alged informer, but the trial judge would allow the defense to elicit that the informer had been reliable before. Examples of this are found in the printed record of the case at pages 23, 24, 25. The trial judge refused to allow the defense counsel to elicit from the police officer who applied for a search warrant, who the alleged informer had informed on before. In fact, hewould not even allow the defense to elicit from the officer whether the other times the alleged informer had been reliable were the times which the officer mentioned in the affidavit given to the magistrate as a basis for issuing the search warrant. The trial judge refused to allow defense counsel to elicit from the officer why he had not arrested at least eleven of the persons the alleged informer had informed on. The trial court would not even allow the defense to determine whether the alleged informer had a criminal record. In fact, the trial court would not allow the defense to elicit whether the informer was registered for the draft or whether he had an occupation.

These matters, of course, violate the holdings in several cases of this court. In **ON LEE** v. **UNITED STATES,** 343 U. S. 747, 96 L ed. 1270, 72 S Ct. 967, this Court, per Justice Jackson, stated this at 343 U. S. 757:

"The use of informers accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe examination and to have the issues submitted to the jury with careful instructors."

The **ON LEE** case was one in which an informer, Chin Poy, had used an electronic device concealed on his person while he talked to the defendant. Chin Poy was not called as a witness, and the government agent testified, and, presumably, (the case does not specify) the agent related what he heard via the apparatus attached to Chin Poy and, also presumably, he related what Chin Poy told him.

This was the situation that compelled this Court to state that the defense must be given broad latitude in cross-examination of the officer if the informer is not called — as was done in the case before this bar of justice. The North Carolina Court would not even allow a minimal cross-examination, and this is exact by what the **ON LEE** case is not the only case to state it is a defendant's right to allow cross-examination about an informer. In **ROVIARO** v. **UNITED STATES,** 353 U.S. 53, 1L Ed. 2d 639, 77 S. Ct. 623, this Court held, that under the circumstances of that case, it was error for the trial court to refuse Romaro's request for identification of the alleged informer. The facts are somewhat different from the case at bar. In **ROVIARO,** the INFORMER was the only possible witness for the

defendant. But in the case at bar the defendant's need for information about the informer was equally needed — at least to the extent of finding out some information about the alleged informer that might serve to impeach him and this discredit him before the jury. There are differences in the two cases, of course. The **ROVIARO** case had to do with an informer who allegedly was a buyer of heroin from the defendant Roviaro, but who, of course, was not present at the trial and who apparently had denied any knowledge of the defendant. This chain of events, of course, left the proving of the case solely on the officers. This is not an unusual state of affairs in a criminal trial, but in **ROVIARO,** there were two counts in the indictment. One was sale of heroin and the other was transportation of the same substance, and the government claimed that, although there was no basis for withholding the identity of the informer on the first count, that of sale, there was a basis on the second count, that of transportation. Thus, the government admitted in **ROVIARO** that where the crime requires at least two persons to commit the criminal act, they should reveal the identity of the informer. But this Court went even further than that. At 353 U. S. 60, this language appears:

> "The scope of the priviledge is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not priviledged Lkiewise, once the identity of the informer has been disclosed

> to those who would have cause to resent the communication, the priviledge is no longer applicable. A further limitation on the applicability of the priviledge arises from the fundamental requirements of fairness, where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."

Then this Court went on and reversed Roviaro's conviction, holding that identity was necessary. In the case at bar, it is easy to see that an absolute bar on any cross-examination of the officer concerning the alleged informer would preclude any determination, in the first instance, of whether the identity would be helpful or not. And indeed, if the trial court had only allowed cross-examination concerning the things that defense counsel asked, even if identity was withheld, the defense might have been able to argue that the informer was lying because of his involvement or any of a number of other reasons, and thus might have convinced the trial judge that the affidavit used to secure the search warrant was not adequate. After all, to say that an informer was reliable before is to run into a first cause, as it were, and is to say that, inexorably, that sometime before this time was the first time the alleged informer had informed, and therefore, he could not have been reliable before that time. But to forbid absolutely any cross-examination about the informer is to cut off any information about

when the informer first informed, and therefore puts a possible premium on perjury. In other words, no one will ever know when the informer first informed and therefore no one will ever know whether the polic are correct when they allege that the informer has been reliable before. This is the result that follows from a cross-examination that allows no questioning about the informer. It does not comport with due process or fair play.

Other cases, of course, buttress the rule in **ROVIARO.** Although **McCray** v **Illinois,** 386 U.S. 300, 18 L Ed. 2d 62, 87 S. Ct. 1056, does hold that the informer's name need not be given in every case, the court by dicta, at least, does sanction a searching cross-examination. At 386 U. S. at page 313, this Court stated:

> "The arresting officers in this case testified in open court, fully and in precise detail as to what the informer told them, and as to why they had reason to believe his information was trustworthy. Each officer was under oath. Each was subjected to searching cross-examination. The judge was obviously satisfied that each was telling the truth, and for that reason he exercised the discretion conferred upon him by the established law of Illinois to respect the informer's priviledge."

This, of course, is the very thing that the trial judge in the mase at the bar did not allow, and it is the thing that this petitioner assigns as constitu-

tional error. No searching cross-examination was allowed. In fact none was allowed at all. This is the point: to shut off all questioning about the informer is a violation of due process and the Sixth Amendment to Constitution of the United States.

CONCLUSION

The record in this case reveals clearly that in at least three particulars the defendant — petitioner did not receive a trial that comported with due process and the right of confrontation. This Court should grant certiorari to right the wrongs committed in this case, and to thereby instruct the court of this country in the proper procedures to follow in cases of this nature.

Respectfully submitted,
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FILED

'73 JAN., 8 A.M. 11:44

J. P. SHOHRE C.S.C.

NO. 7218SC773 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Fall Session 1972

71 Cr 66721

STATE OF NORTH CAROLINA

v. **From Guilford**

ELMOND (EDMOND) GABRIEL HARDY, JR

Appeal by defendant from Seay, Judge, 5 June 1972 Session of Superior Court held in Guilford County.

Defendant was charged in a bill of indictment, proper in form, with the felony of possession of a controlled substance (heroin) with intent to distribute. At the trial of the cause, the State announced its intention to "prosecute and proceed on simple possession of heroin." The defendant pleaded not guilty. Trial was by jury.

The evidence for the State tended to show that Officers Heffinger, Daughtry, Bunton and Gibson of the Greensboro Police Department, armed with a duly issued search warrant, stopped the defendant's car at the rear of the apartment at 701-B Jennifer Street, Greensboro, about 12:15 a.m. on 16 February 1972. The defendant was driving the auto-

mobile and there were two passengers. Officer Heffinger approached the automobile, identified himself as a police officer, and read the search warrant to the defendant. The search warrant commanded the affiant, or other lawful official, to "search Elmond G. Hardy, his person and his residence at 701-B Jennifer St., and his automobile, a 1970 red Oldsmobile, 1972 N. C. Lic. SONNIE, for the property in question." Pursuant to the warrant, Officers Heffinger and Gibson searched the person of the defendant and seized from his right front pants pocket a "bullet projectile that comes from the base of the shell" which had "a small gold-colored spoon at the base of the bullet," with some white powder in it.

Thereafter, the officers began to search defendant's automobile, which was the same automobile as was described in the search warrant. While the automobile was being searched, people came out of nearby apartments, gathered around the car, and cursed loudly, using threatening language toward the officers. Officer Heffinger recovered a loaded .38 pistol and two needles and syringes from underneath the dashboard of the defendant's Oldsmobile near the steering column.

Heffinger placed the defendant under arrest for carrying a concealed weapon. Thereafter, because of the harassment and threatening nature of the crowd gathered around the defendant's automobile, the officers took the defendant and drove the defendant's Oldsmobile and their two unmarked police cars to the premises of the Kirk-Sineath

Motor Company about two miles from Jennifer Street, where the search was continued. As a result of the search, the officers recovered some nineteen glassine bags containing a white powder which was analyzed and determined to be the narcotic drug heroin. Defendant offered no evidence.

After his arraignment, at which defendant pleaded not guilty, and the selection of a jury, defendant moved to quash the search warrant upon the grounds of the insufficiency of the affidavit upon which it was based and to suppress the evidence seized pursuant thereto. The motion, after a voir dire hearing, was denied. At the close of all the evidence, the defendant moved for judgment as of nonsuit. The motion was denied. The jury returned a verdict of guilty of the unlawful possession of the controlled substance heroin. Judgment was entered on the verdict that defendant be imprisoned for a term of five years. Defendant appealed to the Court of Appeals, assigning error.

Attorney General Morgan and Associate Attorney Sherrill for the State.

Lee, High, Taylor & Dansby by Herman L. Taylor and Samuel S. Mitchell for defendant appeallant.

MALLARD, Chief Judge. In the record on appeal the defendant is referred to as Edmond Gabriel Hardy, Jr., as Elmond Gabriel Hardy, Jr., and otherwise. In the search warrant he is referred to as Elmond Gabriel Hardy, Jr. In the bill of indictment he is referred to as Edmond Gabriel Hardy, Jr. In the title of the Judgment and Commitment on

the original record filed with the Court of Appeals he is referred to as Edmond (Elmond) Gabriel Hardy. In the title to the defendant's "statement of case on appeal" and in a stipulation signed by his attorney he is referred to as Edmond Gabriel Hardy, Jr. In the title to the appearance bond he signed when he appealed to the Court of Appeals he is referred to as Edmond Gabriel HaHrdy. However, in places where a reproduction of his signature appears in the original record filed in this office, he appears to have signed his name "Elmond G. Hardy, Jr." In the briefs and record on appeal and during the trial, no objection and no reference was made to the different spellings of the defendant's name. We are of the opinion that if the question had been raised, the doctrine of idem sonans would apply. See 4 Strong, N. C. Index 2d, Indictment and Warrant, § 10.

Defendant assigns as error the denial of his motion to quash the search warrant and to suppress the evidence seized pursuant thereto. Defendant argues in his brief "that the trial court committed prejudicial and reversible error by failing to quash the search warrant and all evidence presumably gathered thereunder **by reason of the unreasonableness of the search** and its contravention of rights guaranteed to the defendant by the 4th and 14th Amendments to the United States Constitution and by Secion 20 and 23 of Article I of the Constitution of North Carolina." (Emphasis added.) The defendant does not otherwise contend or argue in his brief that the affidavit used to obtain the search

warrant was insufficient or that the search warrant was not properly issue. Defendant argues, however, that the search of the defendant's automobile was conducted in an unreasonable manner in that during the course of the search, the automobile was moved from the parking area near 701-B Jennifer Street to the grounds of the Kirk-Sineath Motor Motor Company, approximately two miles from Jennifer Street, where the search was completed.

After the defendant moved to quash the search warrant, the trial judge conducted a voir dire hearing to determine the validity of the search warrant and the lawfulness of the search. After hearing the evidence and argument, the court made findings of fact and concluded that the affidavit was sufficient, that the search warrant was properly issued and was valid, and that:

> ". . . (T)he search was begun there at 701-B Jennifer Street and continued in the vicinity of Kirk-Sineath Motor Company, being moved by reason of the arrival of a threatening and angry crowd; . . . that from the evidence and the facts found, the Court concludes that . . . the search was a reasonable search; . . . and that the reason for changing the location of the search was a valid one . . . ."

We hold that the affidavit used to obtain the search warrant was sufficient, the search warrant was valid, and there was ample evidence to support the findings of fact and conclusions of law made by Judge Seay.

We now consider whether the circumstances of this case made the search unreasonable as a matter of law.

In State v. HiHIHI, 278 N.C. 365, 180 S.E. 2d 21 (1971), it is stated that:

> "We think it clear that **Chambers** controls the instant case. Here, the police, acting on reliable information, had probable cause to stop the 1964 Fairlane driven by Galloway and arrest him. As in **Chambers,** a careful search of the car was reasonable, but impractical and perhaps dangerous at the time and place of the arrest. The station house search a short time later was fully justified and constituted a lawful search."

Accord, Chambers v. Maroney, 399 U.S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1970); United States v. Chalk, 441 F. 2d 1277 (4th Cir. 1971), **cert. denied,** 404 U.S. 943.

In the case before us the State's evidence tended to show that an "angry" crowd of people gathered around the officers while they were attempting to search the defendant's automobile there in the dark parking area back of the apartment building. Some of the members of this group were cursing in a loud voice and making threats against the police officers. The police officers properly removed the arrested defendant and his automobile to a less turbulent scene in order to complete the search of the vehicle under the search warrant. This was the exercise by the police officers of prop-

er precautionary measures, and it was not error to complete the search of the defendant's automobile at a more tranquil scene.

It follows, therefore, that items seized as a result of that search were properly admitted in evidence, and no error was committed in denying the motion to quash the search warrant and suppress the evidence seized pursuant thereto. This assignment of error is overruled.

Defendant assigns as error the admission in evidence of inculpatory statements made by defendant after defendant had been arrested and while his automobile was being searched and when the police officers had not informed defendant of his constitutional right to counsel and to remain silent.

Officer J. D. Heffinger of the Greensboro Police Department testified that:

> "Before the bags were found, Officer Bunton, who was standing with Mr. Hardy, asked Mr. Hardy if he wanted to go and sit in the police car out of the rain and cold. Mr. Hardy stated that —
>
> DEFENSE COUNSEL: Objection.
>
> COURT: Overruled. EXCEPTION NUMBER E-58.
>
> WITNESS (continuing): — that he did not, that he wanted to stay there and see what stuff that the officers found. About five or ten minutes passed before the glassine bags were found. As I was counting the bags, Detective

Gibson again laid down in the seat and started to reach up under the dash and he said, 'Let me see if I can find anything else.' Mr. Hardy said, 'No, that's all there is.'

MR. TAYLOR: Objection to that and move to strike."

On voir dire examination, the court concluded, on facts properly found and supported by the evidence, that the "response and statement made by the defendant was freely and understandingly and voluntarily made, without coercion; that it was not as the result of an interrogation . . . . Further, that when Officer Gibson found certain glassine bags . . . that the defendant made a spontaneous statement at that time; that the statement was not in response to any questions directed toward him and was not the product of any threat, offer of reward, or intimidation of the defendant," and thereupon overruled the objection and motion to strike.

The issue is whether the circumstances of this case, as a matter of law, rendered the statements inadmissible.

The statements made by defendant to Officers Bunton and Gibson were inculpatory since they admitted, in effect, that defendant had heroin under his control, hidden in his car. Moreover, defendant was under arrest when he made the statements and was in a police dominated atmosphere. However, the fact that defendant was in custody when he made the inculpatory statements does not of itself render them inadmissible. State v. Muse, 280

N.C. 31, 185 S.E. 2d 214 (1971), **cert. denied,** 406 U.S. 974; State v. Fletcher and State v. St. Arnold, 279 N.C. 85, 181 S.E. 2d 405 (1971). Voluntariness remains the test of admissibility of inculpatory statements. State v. Fletcher and State v. St. Arnold, supra; State v. McCloud, 276 N.C. 518, 173 S.E. 2d 753 (1970). The so-called "Miranda warnings" are only required when a defendant is subject to a custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974 (1966); State v. Fletcher and State v. St. Arnold, supra, State v. Meadows, 272 N.C. 327, 158 S.E. 2d 638 (1968). Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, state or federal. State v. Haddock, 281 N.C. 675, 190 S.E. 2d 208 (1972); State v. Ratliff, 281 N.C. 397, 189 S.E. 2d 179 (1972); State v. Stepney, 280 N.C. 306, 185 S.E. 2d 844 (1972); State v. Chance, 279 N.C. 643, 185 S.E. 2d 227 (1971).

Under the totality of the circumstances of this case, the inculpatory statements made by defendant were not coerced as a result of a custodial interrogation; rather, the statements were volunteered and were properly admitted in evidence regardless of the fact that no "Miranda warnings" were given the defendant before making them. This assignments of error is overruled.

Defendant's other assignments of error, including his motion for nonsuit, were not brought forward in the brief and argued; therefore, they are taken as abandoned. Rules of Practice in the Court of Appeals, No. 28.

In the trial we find no prejudicial error.

No Error.

Judges MORRIS and HEDRICK concur.

No. 151PC EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1972

STATE OF NORTH CAROLINA

v

EDMOND GABRIEL HARDY, JR.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE N. C. COURT OF APPEALS (7218SC773)

* * * * * *

This matter came on to be considered upon a petition for writ of certiorari to the N. C. Court of Appeals to review its decision on the 6th day of March, 1973, by the Chief Justice and Associate Justices of the Supreme Court of North Carolina, to whom it appeared that the said petition should be denied.

NOW, THEREFORE, it is ordered accordingly by the Court in conference that the petition be and the same is hereby denied, and that it be so certifid to the Clerk of the N. C. Court of Appeals and to counsel for all the parties.

Witness my hand and official seal, this the 6th day of March, 1973.

DAVID ETAOI ETAAO
Clerk of the Supreme Court

cc: Mr. Russell G. Sherrill, III, Associate Attorney General
Mr. Samuel S. Mitchell, Attorney at Law
Mr. Herman L. Taylor, Attorney at Law
Mr. William Douglas Albright, Solicitor

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 72-1619

EDMOND GABRIEL HARDY, JR.,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The Respondent prays that the Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA seeking review of an Order of the Supreme Court of the State of North Carolina entered on March 6, 1973, be denied.

CITATIONS TO OPINIONS BELOW

The Order of the Supreme Court of North Carolina denying certiorari dated March 6, 1973, and the opinion of the Court of Appeals of North Carolina reported at 17 N.C. App. 169, filed December 19, 1972, 10:41 a.m., are set out in Appendix A of the Petitioner's PETITION FOR WRIT OF CERTIORARI (pp. 19-29). Respondent's Appendices I and II (pp. 9 and 16).

JURISDICTION

This case was decided by the Supreme Court of North Carolina by an order dated March 6, 1973, and by the Court of Appeals of North Carolina, State v. Edmond Gabriel Hardy, Jr., 17 N.C. App. 169, January 1973. The petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3) and further under the Fourth and Fifth and Fourteenth Amendments to the United States Constitution and Sections 19, 20 and 23, Article 1, Constitution of North Carolina. The Respondent contends that there has been no deprivation of rights secured by the Constitution of the United States and that this Court should not assume jurisdiction of this case.

STATEMENT

Defendant appellant was tried on a bill of indictment returned during the May 22, 1972, Session of Guilford County Superior Court charging defendant with felonious possession " . . . with intent to distribute a controlled substance, to wit: Heroin, which is included in Schedule I of the North Carolina Controlled Substances Act." (R p 8). Defendant was tried during the June 5, 1972, Session of Superior Court held in Guilford County, the Honorable Thomas W. Seay, Jr., presiding.

In open court, the solicitor announced that he would place defendant on trial only for simple possession of heroin and not for possession with intent to distribute. (R pp 12-13). Defendant entered a plea of not guilty. (R p 13). The jury returned a verdict of guilty of possession of heroin (R p 8) and defendant was sentenced to an active prison term of five (5) years. (R p 9). In apt time, defendant gave notice of appeal to the North Carolina Court of Appeals.

STATEMENT OF FACTS

On February 15, 1972, at 9:25 p.m. a warrant was issued to J. D. Heffinger of the Greensboro Police Department, Vice Division, authorizing him to search the person, automobile, and premises of defendant appellant for the controlled substance, heroin.

(R pp 4-5). This warrant was based on information supplied to Officer Heffinger by a reliable informer. After receiving the warrant, Officer Heffinger, along with several other officers from the Vice Division, went to 701-B Jennifer Street in Greensboro, where defendant was reportedly residing, twice between the hours of 9:30 p.m. and 12 o'clock midnight. On each of these occasions they failed to see defendant's 1970 red Oldsmobile with the license plate "SONNIE" in the area. (R p 19).

Shortly after midnight, Officer Heffinger received information over his radio from other officers that defendant's car had been spotted heading toward Jennifer Street. Officer Heffinger and Officer Bunton proceeded to 701-B Jennifer Street and positioned themselves at the rear of the building. Officers Daughtry and Gibson followed the defendant's car into the driveway of the apartment. As defendant stopped his car, Officer Heffinger approached the vehicle with his badge out, identified himself, and ordered the occupants of the car to get out. At this time Officer Heffinger read the search warrant to the defendant. (R pp 45-46). After reading the warrant, Officers Heffinger and Gibson searched the defendant and found in his right front pocket a bullet which, when the projectile portion was pulled away from the shell casing, revealed a small spoon containing some white powder (R p 26) which preliminary tests established as containing heroin. (R p 72). In searching the car, Officer Heffinger discovered a loaded .38 caliber pistol concealed under the dashboard to the left of the steering column, a box of .38 caliber ammunition in the back seat, and two needles and syringes under the dashboard just to the right of the steering column. Upon finding the pistol, defendant was placed under arrest for carrying a concealed weapon.

At about this time a crowd of approximately ten residents of the neighborhood gathered in the area and began cursing and using threatening language toward the officers. (R p 55). The search was being conducted in an alley which was not well-lighted. (R p 20). Officer Heffinger told defendant that his car was going to be moved to Kirk-Sineath Motors where the search would be continued. Enroute to Kirk-Sineath, Officer Bunton led in a police car, followed by defendant's car driven by Officer Daughtry, and finally the second police car driven by Officer Heffinger with defendant and Officer Gibson in the back seat. (R p 55).

At Kirk-Sineath Motors, defendant's car was driven about halfway into the garage area to get the front portion of the car out of the rain. Defendant was standing beside his car as the search continued. (R p 55). Officer Bunton asked defendant if he would like to get out of the cold and rain and sit in the police car to which defendant replied, "No, I want to stay here and see the stuff they find." (R p 57). Defendant had not been advised of his rights at this time. Officer Gibson, who was searching under the dashboard, found a bundle of glassine bags with a rubber band around it. (R p 56). The bags contained a white powder which was later established as containing heroin. (R p 72). After finding this bundle, Officer Gibson began to search under the dashboard again and said, "Let me see if I can find anything else." At this time defendant made the statement, "No, that's all there is." (R p 56). Defendant had still not been advised of his rights at this time.

ARGUMENT

I.

DID THE TRIAL COURT ERR IN FAILING TO QUASH THE SEARCH WARRANT AND THE EVIDENCE ALLEGEDLY FOUND AT THE SECOND SEARCH LOCATION?

There is ample evidence in the record to uphold the trial court's finding that the affidavit and search warrant involved here met all the legal requirements for validity. *State v. Spencer*, 281 N.C. 121; *State v. Altman*, 15 N.C. App. 257; *State v. Moye*, 12 N.C. App. 178; *State v. Bush*, 10 N.C. App. 247.

Appellant contends, without citing any authority, that the search of his automobile at Kirk-Sineath Motors after its removal from the scene of the initial search was unlawful. The officers involved in the search testified that the location where appellant was stopped was a poorly lighted alley and that a crowd of neighborhood residents gathered and began using abusive and threatening language toward them. Under these circumstances, it was perfectly reasonable for the officers to remove appellant and his vehicle to a safer locality in order to complete their lawful search. The North Carolina Supreme Court considered similar circumstances

in *State v. Hill*, 278 N.C. 365, 180 S.E. 2d 21, and said " . . . a careful search of the car was reasonable but impractical and perhaps dangerous at the time and place of arrest. The station house search a short time later was fully justified and constituted a lawful search." The U.S. Supreme Court has said, "It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and safety of his car to have the vehicle and the keys together at the station house." *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (Footnote 10) (1970). For other cases upholding searches similar to the one here complained of see *U.S. v. Powell*, 407 F. 2d 582 (1960); *State v. Gibson* and *State v. Dewalt*, 15 N.C. App. 445, 190 S.E. 2d 315.

II.

DID THE TRIAL COURT ERR IN ADMITTING EXTRAJUDICIAL STATEMENTS OF DEFENDANT WHICH WERE ALLEGEDLY MADE AFTER HIS ARREST AND WITHOUT THE WARNING AS TO HIS RIGHT OF COUNSEL AND SILENCE?

Appellant here contends, again without citing any authority for his proposition, that the trial court erred in allowing the officers to testify to certain statements made by appellant when he had not been given a *Miranda* warning. The statements complained of related to the officers' search for and subsequent finding of heroin in appellant's car. At the time he made these statements, appellant was under arrest for carrying a concealed weapon but had not been arrested for or charged with any violation of the North Carolina Controlled Substances Act.

The U.S. Supreme Court, in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), stated:

> "The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be *interrogated . . . . Volunteered statements of any*

kind are not barred by the fifth amendment and their admissibility is not affected by our holding today." (Emphasis added).

The North Carolina Supreme Court has said:

> "The circumstances of this case do not show that defendant's statements were 'obtained by hope or fear,' *State v. Roberts*, 12 N.C. 259, or that they resulted from any sort of pressure, *State v. Perry, supra.* This record clearly shows that there was no custodial interrogation. Thus, it was not necessary for Agent Wise to warn defendant of his rights as required by *Miranda v. Arizona, supra." State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214.

The trial court, on *voir dire*, correctly determined that appellant's statements were freely, understandingly and voluntarily made, without coercion and not as a result of any interrogation by the officers. The evidence was plenary in support of this finding.

In further support of this contention see also *State v. Haddock*, 281 N.C. 675, 190 S.E. 2d 208; *State v. Fletcher* and *State v. St. Arnold*, 279 N.C. 85, 181 S.E. 2d 405; *State v. Barber*, 270 N.C. 222, 154 S.E. 2d 104; *State v. Murphy*, 15 N.C. App. 420, 190 S.E. 2d 361; *State v. Beasley*, 10 N.C. App. 663, 179 S.E. 2d 820.

CONCLUSION

For reasons stated, the Respondent contends that the judgment of the trial court, as affirmed by the North Carolina Court of Appeals, in no way violated the Constitution of the United States. The Respondent respectfully submits that this court should, therefore, deny the Petition for Writ of Certiorari to the Supreme Court of North Carolina.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA upon the Attorney for the Petitioner, Edmond Gabriel Hardy, Jr., by placing copies of said RESPONSE in the United States Post Office at Raleigh, North Carolina, with postage prepaid and with the same addressed to:

Herman L. Taylor, Esquire
Lee, High, Taylor, Dansby & Stanback
Post Office Box 20027
Greensboro, North Carolina 74202

Counsel for Petitioner

This the _____ day of October, 1973.

_____
Assistant Attorney General
of North Carolina

APPENDIX I

NO. 7218SC773 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Fall Session 1972

STATE OF NORTH CAROLINA

v. From Guilford

ELMOND (EDMOND) GABRIEL HARDY, JR.

Appeal by defendant from Seay, Judge, 5 June 1972 Session of Superior Court held in Guilford County.

Defendant was charged in a bill of indictment, proper in form, with the felony of possession of a controlled substance (heroin) with intent to distribute. At the trial of the cause, the State announced its intention to "prosecute and proceed on simple possession of heroin." The defendant pleaded not guilty. Trial was by jury.

The evidence for the State tended to show that Officers Heffinger, Daughtry, Bunton and Gibson of the Greensboro Police Department, armed with a duly issued search warrant, stopped the defendant's car at the rear of the apartment at 701-B Jennifer Street, Greensboro, about 12:15 a.m. on 16 February 1972. The defendant was driving the automobile and there were two passengers. Officer Heffinger approached the automobile, identified himself as a police officer, and read the search warrant to the defendant. The search warrant commanded the affiant, or other lawful official, to "search Elmond G. Hardy, his person and his residence at 701-B Jennifer St., and his automobile, a 1970 red Oldsmobile, 1972 N.C. Lic.

SONNIE, for the property in question." Pursuant to the warrant, Officers Heffinger and Gibson search the person of the defendant and seized from his right front pants pocket a "bullet projectile that comes from the base of the shell" which had "a small gold-colored spoon at the base of the bullet," with some white powder in it.

Thereafter, the officers began to search defendant's automobile, which was the same automobile as was described in the search warrant. While the automobile was being searched, people came out of nearby apartments, gathered around the car, and cursed loudly, using threatening language toward the officers. Officer Heffinger recovered a loaded .38 caliber pistol and two needles and syringes from underneath the dashboard of the defendant's Oldsmobile near the steering column.

Heffinger placed the defendant under arrest for carrying a concealed weapon. Thereafter, because of the harrassment and threatening nature of the crowd gathered around the defendant's automobile, the officers took the defendant and drove the defendant's Oldsmobile and their two unmarked police cars to the premises of the Kirk-Sineath Motor Company about two miles from Jennifer Street, where the search was continued. As a result of the search, the officers recovered some nineteen glassine bags containing a white powder which was analyzed and determined to be the narcotic drug heroin. Defendant offered no evidence.

After his arraignment, at which defendant pleaded not guilty, and the selection of a jury, defendant moved to quash the search warrant upon the grounds of the insufficiency of the affidavit upon which it was based and to suppress the evidence seized pursuant thereto. The motion, after a voir dire hearing, was denied. At the close of all the evidence, the defendant moved for judgment as of nonsuit. The motion was denied. The jury returned a verdict of guilty of the unlawful possession of the controlled substance heroin. Judgment was entered on the verdict that defendant be imprisoned for a term of five years. Defendant appealed to the Court of Appeals, assigning error.

Attorney General Morgan and Associate Attorney Sherrill for the State.

Lee, High, Taylor & Dansby by Herman L. Taylor and Samuel S. Mitchell for defendant appellant.

MALLARD, Chief Judge. In the record on appeal the defendant is referred to as Edmond Gabriel Hardy, Jr., as Elmond Gabriel Hardy, Jr., and otherwise. In the search warrant he is referred to as Elmond Gabriel Hardy, Jr. In the bill of indictment he is referred to as Edmond Gabriel Hardy, Jr. In the title of the Judgment and Commitment on the original record filed with the Court of Appeals he is referred to as Edmond (Elmond) Gabriel Hardy. In the title to the defendant's "statement of case on appeal" and in a stipulation signed by his attorney he is referred to as Edmond Gabriel Hardy, Jr. In the title to the appearance bond he signed when he appealed to the Court of Appeals he is referred to as Edmond Gabriel Hardy. However, in places where a reproduction of his signature appears in the original record filed in this office, he appears to have signed his name "Elmond G. Hardy, Jr.". In the briefs and record on appeal and during the trial, no objection and no reference was made to the different spellings of the defendant's name. We are of the opinion that if the question had been raised, the doctrine of idem sonans would apply. See 4 Strong, N.C. Index 2d, Indictment and Warrant, §10.

Defendant assigns as error the denial of his motion to quash the search warrant and to suppress the evidence seized pursuant thereto. Defendant argues in his brief "that the trial court committed prejudicial and reversible error by failing to quash the search warrant and all evidence presumably gathered thereunder *by reason of the unreasonableness of the search* and its contravention of rights guaranteed to the defendant by the 4th and 14th Amendments to the United States Constitution and by Section 20 and 23 of Article I of the Constitution of North Carolina." (Emphasis added.) The defendant does not otherwise contend or argue in his brief that the affidavit used to obtain the search warrant was insufficient or that the search warrant was not properly issued. Defendant argues, however, that the search of the defendant's automobile was conducted in an unreasonable manner in that during the course of the search, the automobile was moved from the parking area near 701-B Jennifer Street to the grounds of the Kirk-Sineath Motor Company, approximately two miles from Jennifer Street, where the search was completed.

After the defendant moved to quash the search warrant, the trial judge conducted a voir dire hearing to determine the validity of the search warrant and the lawfulness of the search. After hearing the evidence and argument, the court made findings of fact and concluded that the affidavit was sufficient, that the search warrant was properly issued and was valid, and that:

> " . . . (T)he search was begun there at 701-B Jennifer Street and continued in the vicinity of the Kirk-Sineath Motor Company, being moved by reason of the arrival of a threatening and angry crowd; . . . that from the evidence and the facts found, the Court concludes that . . . the search was a reasonable search; . . . and that the reason for changing the location of the search was a valid one . . . ."

We hold that the affidavit used to obtain the search warrant was sufficient, the search warrant was valid, and there was ample evidence to support the findings of fact and conclusions of law made by Judge Seay.

We now consider whether the circumstances of this case made the search unreasonable as a matter of law.

In State v. Hill, 278 N.C. 365, 180 S.E. 2d 21 (1971), it is stated that:

> "We think it clear that *Chambers* controls the instant case. Here, the police, acting on reliable information, had probable cause to stop the 1964 Fairlane driven by Galloway and arrest him. As in *Chambers*, a careful search of the car was reasonable, but impractical and perhaps dangerous at the time and place of the arrest. The station house search a short time later was fully justified and constituted a lawful search."

Accord, Chambers v. Maroney, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970); United States v. Chalk, 441 F. 2d 1277 (4th Cir. 1971), *cert. denied*, 404 U.S. 943.

In the case before us the State's evidence tended to show

that an "angry" crowd of people gathered around the officers while they were attempting to search the defendant's automobile there in the dark parking area back of the apartment building. Some of the members of this group were cursing in a loud voice and making threats against the police officers. The police officers properly removed the arrested defendant and his automobile to a less turbulent scene in order to complete the search of the vehicle under the search warrant. This was the exercise by the police officers of proper precautionary measures, and it was not error to complete the search of the dfendant's automobile at a more tranquil scene.

It follows, therefore, that items seized as a result of that search were properly admitted in evidence, and no error was committed in denying the motion to quash the search warrant and suppress the evidence seized pursuant thereto. This assignment of error is overruled.

Defendant assigns as error the admission in evidence of inculpatory statements made by defendant after defendant had been arrested and while his automobile was being search and when the police officers had not informed defendant of his constitutional right to counsel and to remain silent.

Officer J.D. Heffinger of the Greensboro Police Department testified that:

> "Before the bags were found, Officer Bunton, who was standing with Mr. Hardy, asked Mr. Hardy if he wanted to go and sit in the police car out of the rain and cold. Mr. Hardy stated that —
>
> DEFENSE COUNSEL: Objection.
> COURT: Overruled. EXCEPTION NUMBER E-58.
>
> WITNESS (continuing):–that he did not, that he wanted to stay there and see what stuff that the officers found. About five or ten minutes passed before the glassine bags were found. As I was counting the bags, Detective Gibson again laid down in the seat and started to reach up under the dash and he said, 'Let me see if I can find anything else.' Mr. Hardy

said, 'No, that's all there is.'

MR. TAYLOR: Objection to that and move to strike."

On voir dire examination, the court concluded, on facts properly found and supported by the evidence, that the "response and statement made by the defendant was freely and understandingly and voluntarily made, without coercion; that it was not as the result of an interrogation . . . . Further, that when Officer Gibson found certain glassine bags . . . that the defendant made a spontaneous statement at that time; that the statement was not in response to any questions directed toward him and was not the product of any threat, offer of reward, or intimidation of the defendant," and thereupon overruled the objection and motion to strike.

The issue is whether the circumstances of this case, as a matter of law, rendered the statements inadmissible.

The statements made by defendant to Officers Bunton and Gibson were inculpatory since they admitted, in effect, that defendant had heroin under his control, hidden in his car. Moreover, defendant was under arrest when he made the statements and was in a police dominated atmosphere. However, the fact that defendant was in custody when he made the inculpatory statements does not of itself render them inadmissible. State v. Muse, 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. denied*, 406 U.S. 974; State v. Fletcher and State v. St. Arnold, 279 N.C. 85, 181 S.E. 2d 405 (1971). Voluntariness remains the test of admissibility of inculpatory statements. State v. Fletcher and State v. St. Arnold, supra; State v. McCloud, 276 N.C. 518, 173 S.E. 2d 753 (1970). The so-called "Miranda warnings" are only required when a defendant is subjected to a custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974 (1966); State v. Fletcher and State v. St. Arnold, supra; State v. Meadows, 272 N.C. 327, 158 S.E. 2d 638 (1968). Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, state or federal. State v. Haddock, 281 N.C. 675, 190 S.E. 2d 208 (1972); State v. Ratliff, 281 N.C. 397, 189 S.E. 2d 179 (1972); State v. Stepney, 280 N.C. 306, 185 S.E. 2d 844 (1972); State v. Chance, 279 N.C. 643, 185 S.E. 2d 227 (1971).

Under the totality of the circumstances of this case, the inculpatory statements made by the defendant were not coerced as a result of a custodial interrogation; rather, the statements were volunteered and were properly admitted in evidence regardless of the fact that no "Miranda warnings" were given the defendant before making them. This assignment of error is overruled.

Defendant's other assignments of error, including his motion for nonsuit, were not brought forward in the brief and argued; therefore, they are taken as abandoned. Rules of Practice in the Court of Appeals, No. 28.

In the trial we find no prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

A TRUE COPY
THEODORE C. BROWN, JR.
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA

By /s/ Pattie P. Barber
Deputy Clerk

September 20, 1973
(SEAL)

APPENDIX II

No. 151PC EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1972

****

STATE OF NORTH CAROLINA	)	ORDER DENYING
	)	PETITION FOR
v	)	WRIT OF
	)	CERTIORARI TO
EDMOND GABRIEL HARDY, JR.	)	THE N. C. COURT
	)	OF APPEALS
	)	(7218SC773)
	)	
	)	
	)	
	)	
	)	

****

This matter came on to be considered upon a petition for writ of certiorari to the N. C. Court of Appeals to review its decision on the 6th day of March, 1973, by the Chief Justice and Associate Justices of the Supreme Court of North Carolina, to whom it appeared that the said petition should be denied.

NOW, THEREFORE, it is ordered accordingly by the Court in conference that the petition be and the same is hereby denied, and that it be so certified to the Clerk of the N. C Court of Appeals and to counsel for all the parties.

Witness my hand and official seal, the the 6th day of March, 1973.

/s/ Adrian J. Newton
Clerk of the Supreme Court

(SEAL)

cc: Mr. Russell G. Sherrill, III,
Associate Attorney General
Mr. Samuel S. Mitchell,
Attorney at Law
Mr. Herman L. Taylor,
Attorney at Law
Mr. William Douglas Albright,
Solicitor